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ORIGINAL

NO. 87-5277

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION
TO THE GRANTING OF A PETITION
FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit Court of Appeals properly found that Petitioner's trial counsel made a tactical decision not to challenge the composition of the grand and traverse jury pools and, therefore, Petitioner's procedural default in failing to make a timely jury challenge was not excusible under the principles of Wainwright v. Sykes, 433 U.S. 72 (1977)?

2.

Whether the Eleventh Circuit Court of Appeals properly found no cause to excuse Petitioner's procedural default with respect to his jury challenges, applying the principles set forth by this Court in Wainwright v. Sykes, 433 U.S. 72 (1977) and Reed v. Ross, 468 U.S. 1 (1984)?

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NO. _____

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PART ONE

STATEMENT OF THE CASE

Petitioner, Tony B. Amadeo, was convicted in the Superior Court of Putnam County, Georgia for the offenses of murder and for criminal attempt to commit theft. Petitioner received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. A motion for a new trial was filed on Petitioner's behalf on December 21, 1977, but was overruled by the Superior Court of Putnam County, Georgia on September 18, 1978.

Petitioner filed a notice of appeal to the Supreme Court of Georgia on October 17, 1978. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences in Amadeo v. State, 243 Ga. 627 256 S.E.2d 382 (1979). Following the submission of briefs on Petitioner's direct appeal, Petitioner

obtained new counsel, who raised additional issues for the consideration of the Supreme Court of Georgia. A motion for rehearing was filed on behalf of the Petitioner raising these additional issues. The Supreme Court of Georgia considered, but rejected, these issues raised in the motion for rehearing, stating its reasons for denying the motion in an opinion dated May 29, 1979. A petition for a writ of certiorari to the Supreme Court of the United States was denied on November 26, 1979 and a petition for rehearing was denied by that Court on January 21, 1980.

Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia. The Superior Court of Putnam County, Georgia, denied Petitioner the relief sought by means of his state habeas corpus petition on February 29, 1980. Next, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. This application was denied on September 10, 1980, with a motion for rehearing being denied on September 24, 1980. A petition for a writ of certiorari was denied by this Court on March 30, 1981, with a petition for rehearing being denied by this Court on May 18, 1981.

Next, Petitioner filed an application for federal habeas corpus relief in the district court, Civil Action No. 81-122-MAC, raising all of the grounds contained in his application for state habeas corpus relief, except for Petitioner's contention that he received ineffective assistance of counsel because of the failure of his trial attorney to raise a challenge to the composition of the grand and traverse juries prior to Petitioner's trial. On September 22, 1982, the district court dismissed the prior application for federal habeas corpus relief without prejudice, based on Petitioner's failure to exhaust his contentions concerning ineffective assistance of counsel.

On October 25, 1982, Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, raising his contention of ineffective assistance of counsel with regard to trial counsel's failure to challenge the composition of the grand and petit juries. Respondent filed an answer to this petition for a writ of habeas corpus and also filed a motion to dismiss the petition, asserting that the claim had been waived under O.C.G.A. § 9-14-51 and that this petition for a writ of habeas corpus should be dismissed as successive. A hearing was conducted in the Superior Court of Butts County, Georgia on March 14, 1983. On March 16, 1983, Respondent's motion to dismiss was granted by the Superior Court of Butts County. Petitioner filed an application for a certificate of probable cause to appeal and Respondent filed a response in opposition to this application. On June 21, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and Petitioner's motion for reconsideration was denied by that court on July 7, 1983.

Next, Petitioner filed a petition for a writ of certiorari in this Court on September 3, 1983 and Respondent filed a brief in opposition to the granting of a petition for a writ of certiorari on October 4, 1983. On October 31, 1983, this Court denied the petition for a writ of certiorari and a petition for rehearing filed on behalf of the Petitioner was denied on January 9, 1984.

Petitioner then filed a second application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. The second application for federal habeas corpus reief was filed on January 25, 1984. An Answer-Response was filed on behalf of the Respondent on March 26, 1984. A brief in support of Petitioner's petition for a writ of habeas corpus was also filed on March 26, 1984.

On April 27, 1984, Petitioner filed a motion for partial summary judgment. On May 17, 1984 the United States District

Court entered an order granting federal habeas corpus relief, vacating Petitioner's conviction and sentence and directing that Petitioner be reindicted and retried. Judgment was entered in favor of the Petitioner on May 18, 1984. (R., Vol. I, p. 151). On June 15, 1984, Respondent filed a timely notice of appeal to the Eleventh Circuit.

The Eleventh Circuit remanded the case to the district court on September 27, 1985 for an evidentiary hearing on the issue of "cause" and "prejudice" alleged to be present for excusing Petitioner's procedural default. Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985). Following the conducting of an evidentiary hearing in the district court, the district court again granted federal habeas corpus relief, finding cause and prejudice to excuse Petitioner's procedural default. The Eleventh Circuit reversed the granting of federal habeas corpus finding Petitioner to have committed a procedural default. Amadeo v. Kemp, 816 F.2d 1502 (11th Cir. 1987). It is this order that Petitioner seeks to have reviewed by this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. TRIAL COUNSEL'S TACTICAL DECISION NOT TO CHALLENGE THE GRAND AND PETIT JURY RESULTED IN A PROCEDURAL DEFAULT WITH RESPECT TO THE JURY CHALLENGES, AS THE TACTICAL DECISION COULD NOT SERVE AS "CAUSE" FOR EXCUSING PETITIONER'S PROCEDURAL DEFAULT UNDER GEORGIA LAW.

In Petitioner's case, the Eleventh Circuit Court of Appeals found that Petitioner had not established "sufficient cause" within the meaning of Wainwright v. Sykes, 443 U.S. 72 (1977) to excuse Petitioner's procedural default with respect to his failure to timely challenge under Georgia law the composition of the grand and petit jury in Putnam County, Georgia. Petitioner asks this Court to grant this petition for writ of certiorari because Petitioner alleges that it was not due to his trial attorney's tactical decision that the jury composition issue was not litigated, but rather Petitioner claims that the jury issue was not litigated allegedly due to government "disception" and "covert interference" with Petitioner's constitutional rights. This claim is not borne out by the record before the district court and the Eleventh Circuit. Instead, the record clearly establishes that the failure of Petitioner to challenge the composition of the grand and traverse juries at the time of his trial, as required by Georgia law, was due to trial counsel's tactical determinations. Amadeo v. Kemp, 816 F.2d 1502, 1506 (11th Cir. 1987).

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. However, Georgia procedure, as well as federal procedure, recognizes a "cause" exception to this timeliness

requirement. Simmons v. State, 226 Ga. 110, 172 S.E.2d 680 (1970); Francis v. Henderson, 425 U.S. 536 (1976). It is uncontested that Petitioner did not challenge the composition of the grand and traverse jury list from which the jurors sitting at his trial were drawn at the time of trial, as required under Georgia law. However, Petitioner did raise his challenge to the composition of the grand and traverse juries on direct appeal to the Supreme Court of Georgia. The Supreme Court of Georgia determined that Petitioner's challenge to the composition of these juries came too late. Amadeo v. State, 243 Ga. 627(4), 256 S.E.2d 382 (1979); citing Goodwin v. Hopper, 243 Ga. 193, 253 S.E.2d 156 (1979).

Similarly, in Petitioner's state habeas corpus proceeding conducted in the Superior Court of Putnam County, Georgia, the state habeas corpus court did not consider the jury composition issue on its merits. Instead the state habeas corpus court determined that it was precluded from reviewing this issue because the issue had been previously determined on direct appeal by the Supreme Court of Georgia. However, the federal district court found that there was cause to excuse Petitioner's procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977) finding that there was a lack of "deliberate withholding" of the claim and an intentional underrepresentation. As the Eleventh Circuit noted, "the district court excused this procedural default, finding that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials." Amadeo v. Kemp, 816 F.2d 1502, 1505 (11th Cir. 1987). However, these factual findings made by the district court were challenged on appeal to the Eleventh Circuit by the Respondent and also the validity of these factual findings as a basis for a conclusion that "cause" existed under Wainwright v. Sykes, supra. .

On appeal to the Eleventh Circuit, the Eleventh Circuit noted that in originally remanding this case for a

determination of whether or not cause existed within the meaning of Wainwright v. Sykes, supra, that Court had directed that the district court determine, pursuant to the standards set forth by this Court in Reed v. Ross, 468 U.S. 1 (1984), whether or not cause existed. In remanding the case for a "cause" determination, the Eleventh Circuit stated:

> To fulfill the causation prong . . . it is necessary for Petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate by-pass.

Amadeo v. Kemp, 773 F.2d 1141, 1145 (11th Cir. 1985). The Eleventh Circuit properly reversed the district court's finding of "cause" based on the testimony of Petitioner's trial counsel given at the evidentiary hearing conducted in the district court pursuant to the Eleventh Circuit's remand.

As noted by the Eleventh Circuit, in this Court's decision in Reed v. Ross, supra, there is a "virtually limitless array of contexts in which a procedural default can occur". Reed v. Ross, supra, at 13. The Eleventh Circuit was clearly authorized to conclude based on the testimony at the evidentiary hearing at the district court that Petitioner's trial counsel considered making a challenge to the grand and petit juries, but rejected such a challenge for "various tactical reasons". Amadeo v. Kemp, 816 F.2d 1502, 1506 (11th Cir. 1987).

Mr. William A. Prior, Petitioner's trial attorney, testified as follows with reference to his consideration of filing a jury challenge on Petitioner's behalf:

> We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a

list of the jurors and we met with an attorney in Putnam County who had been there for many years, Mr. Dallas Veal. We knew -- personally or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item, we decided not to file a challenge. The reason being that we frankly thought that if we filed it in one, we would wind up in worse shape than we were. There were certain people on the Jury that we thought would be favorable to us on the panel. So, all things considered, we did consider it, and decided not to file.

(Evidentiary hearing transcript, pp. 8-9). Mr. Prior further testified:

> We identified on the jury list each juror, prior to trial, in regard to whether they were black or white so we knew the actual members on the Traverse List, who was black and who was white and as I recall that, they were approximately evenly divided.

(Evidentiary hearing transcript, p. 10).

Mr. Prior testified that there were either 110 or 120 jurors and that the black-white ratio was approximately even, with there being numerous women included on the list. Finally, and most tellingly, Mr. Prior testified that:

> . . . But I guess the point I want to make is that I did consider -- Mr. Lambert and I did consider challenging the array and it

> was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a jury list as we could get. We were aware of the fact that the district attorney was likely to be able to introduce other crimes and these other crimes involved the white defendants . . . I'm not certain of the actual racial make-up of the twelve member jury. As I recall though, it was approximately evenly divided.

(Evidentiary hearing transcript, p. 11-12).

When Mr. Prior was questioned with respect to his awareness of prior jury challenges to the Putnam County master jury list, he stated:

> I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would have been one, if had been instituted . . . . The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were. There were several factors; I don't think I mentioned the religious factor. There was at that time in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "Shepard" was in it somewhere, I think, but at any rate, it was

> very active, had a relatively large following in Putnam County and several of these people had visited the defendants in jail and we knew that there were several people on that particular 110 or 120 person pa[illegible]l who were involved in that and that was another reason for thinking we were doing about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

(Evidentiary hearing transcript, 12-13).

Although Mr. Prior testified that he did not recall having any knowledge of the memorandum to the jury commissioners from the district attorney concerning the composition of the jurors, Mr. Prior testified, "we considered challenging it [the composition of the juries] and we thought we would win if we challenged it." (Evidentiary hearing transcript, p. 20).

Under this Court's decision in Reed v. Ross, supra, a tactical decision to forego a procedural opportunity cannot qualify as "cause" for purpose of allowing a federal habeas corpus court to review procedurally defaulted claims on their merits. Reed v. Ross, supra, at 14, cited in Amadeo v. Kemp, 816 F.2d 1502, 1505-1506 (11th Cir. 1987). The district Court improperly relied upon existence of the memorandum from the district attorney to the jury commissioners concerning altering the racial composition of the master jury list, as being a basis for excusing Petitioner's procedural default, in light of the extent of testimony from Petitioner's trial attorneys detailing their strategic decisions in declining to file a jury composition challenge.

The Eleventh Circuit properly applied the principles set forth by this Court in Wainwright v. Sykes, supra, and Reed v. Ross, supra, in reversing the conclusion of the district court that the "concealment" of the memorandum from the county

prosecutor advising the jury commissioners to add specific numbers of blacks to the master jury list excused the procedural default. Amadeo v. Kemp, supra at 1507. The Eleventh Circuit properly concluded as follows:

> The memorandum detailing the county's efforts to alter the racial composition of the master jury list was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury list, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury list and thereby did not become aware of the memorandum until its discovery during the Bailing v. Vining voting rights case. These facts, in our opinion, do not establish sufficient 'cause' to excuse Amadeo's procedural default.

Amadeo v. Kemp, supra at 1507.

Therefore, contrary to Petitioner's assertions, the jury composition issue was not foregone due to "government deception" and "covert interference" by the government with the Petitioner's exercise of his constitutional rights, but was based on a considered tactical decision by Petitioner's competent trial counsel.

Petitioner now alleges, but has never proven, that the "state deliberately concealed evidence of unconstitutional conduct". Rather, as noted, trial counsel for Petitioner was of the opinion that the Putnam County grand and traverse jury lists were challengeable and that such a challenge would probably be successful, but instead, chose to exercise their

strategic choices in declining to make a challenge to the composition of the grand and traverse juries. The fact that the memorandum by the district attorney to the jury commissioners might have supported a challenge to the juries does not negate the fact that there was a tactical decision made to forego the right to a jury challenge. Petitioner has not and cannot establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639, 2645-2646 (1986).

Because Petitioner's jury challenge was deliberately withheld based on a strategical decision by competent trial counsel, Respondent submits that the equitable character of habeas corpus relief cited by Petitioner, as contained in this Court's decision in Wainwright v. Sykes, supra and Kuhlman v. Wilson, ___ U.S. ___, 106 S.Ct. 2616 (1986), does not permit cause to be established by alleging that the government acted improperly in directing the jury commissioners to attempt to obtain specific percentages in the racial composition of the master jury list. There is no support for Petitioner's contention that the failure to litigate was based on government "deception", as the memorandum which Petitioner alleges would have supported the jury challenge was on file in the clerk's office and, therefore, was in fact a matter of public record for whatever use of it could be made at the time of Petitioner's trial. Additionally, the fact that the memorandum was discovered close in point of time to Petitioner's trial also establishes that the memorandum was not "concealed", but rather was available as an alleged basis for the filing of the jury composition claim, which was strategically foregone in this case. See Amadeo v. Kemp, at 1506-1507.

In short, this case fits clearly with the confines of this Court's decisions in Wainwright v. Sykes, supra and Reed v. Ross, supra, and stands for the proposition that cause for excusing a procedural default under state law cannot be established where the failure to pursue the procedurally defaulted claim was based on the reasonable strategical choices of competent trial counsel.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this petition for a writ of certiorari raises no exceptional question which would warrant the granting of a writ of certiorari and, therefore, this petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Op. Cert. Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 22nd day of September, 1987.

Susan V. Boleyn

SUSAN V. BOLEYN
Senior Assistant
Attorney General

(Opinion February 17, 1987, 11 Cir., 1987, 809 F.2d 1534)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc *without* oral argument on a date hereafter to be fixed. The previous panel's opinion is hereby VACATED.

Tony B. AMADEO, Petitioner-Appellee,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellant.

No. 84-8455.

United States Court of Appeals, Eleventh Circuit.

April 30, 1987.

Petitioner, who was inmate under sentence of death, filed petition for habeas corpus relief. The United States District Court for the Middle District of Georgia, granted relief, and state appealed. The Court of Appeals, 773 F.2d 1141, remanded. On remand, the United States District Court for the Middle District of Georgia, 84-76-1-MAC, Wilbur D. Owens, Jr., Chief Judge, granted relief, and state appealed. The Court of Appeals held that: (1) petitioner was not denied his right to fundamentally fair trial by admission of evidence of other crimes, where admission was proper under state law, and there was overwhelming evidence of his guilt, and (2) notwithstanding evidence that county officials manipulated jury lists to maintain racial imbalance, petitioner who failed to challenge racial makeup of master jury lists for tactical reasons was not entitled to relief.

Reversed and remanded.

Clark, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐369.2(1), 374

In order to admit evidence of independent crimes under Georgia law, defendant must be shown to have been perpetrator of independent crime, and there must be sufficient connection between independent crime and offense charged so that proof of former tends to prove latter.

2. Habeas Corpus ⇐45.2(6)

In considering state evidentiary objections, federal court exercises limited review, and evidentiary error must have been of such magnitude as to deny fundamental fairness to criminal trial, thus violating due process clause. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐96

In determining whether admission of prejudicial evidence constitutes denial of fundamental fairness, federal court must decide whether evidence is material in sense of crucial, critical, highly significant factor. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐369.2(4, 6)

Defendant was not denied fundamental fairness in prosecution for murder and attempted armed robbery by introduction of evidence of other murder and armed robbery, where admission of evidence was proper under Georgia law, and there was overwhelming evidence of defendant's guilt. U.S.C.A. Const.Amend. 14.

5. Habeas Corpus ⇐45.3(1.50)

Federal habeas corpus court will not consider issue if petitioner did not pursue issue in state court and thereby committed procedural default, unless he can overcome

this bar by showing cause for an actual prejudice from default.

6. Habeas Corpus ⇐45.3(1.40)

Notwithstanding evidence that county officials attempted to manipulate jury lists to exclude blacks, defendant whose counsel failed to raise challenge of racial makeup of jury at trial court could not obtain federal habeas corpus relief on that basis, where decision to not challenge that trial court was based on tactical reasons, and counsel did not review jury lists and thereby become aware of discriminatory memorandum until after conviction. O.C.G.A. §§ 9-14-42(b), 15-12-162; U.S.C.A. Const. Amend. 14.

Michael J. Bowers, Atty. Gen., Marion O. Gordon, 1st Asst. Atty. Gen., William B. Hill, Jr., Sr. Asst. Atty. Gen., Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant.

William M. Warner, Atlanta, Ga., for petitioner-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal is before this panel for the second time. The petitioner-appellee, Tony B. Amadeo, a Georgia state prisoner under sentence of death,[1] sought a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court granted the writ, concluding (1) that the introduction of "other crimes" evidence rendered Amadeo's trial fundamentally unfair and (2) that minority groups were underrepresented on the master jury lists in Putnam County, Georgia, the location of Amadeo's trial. In the first appeal, we remanded the case for a hearing to determine whether Amadeo could establish sufficient "cause" to excuse his failure to challenge the jury lists at the trial as required by Georgia law. We reserved judgment on the "other crimes" evidence issue. *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir.1985) (per curiam). On remand, the district court conducted a hearing and determined that sufficient "cause" existed to excuse Amadeo's procedural default. The case is now back before us to resolve both issues on the merits. We find that Amadeo has not established sufficient "cause" to excuse the procedural default and that the introduction of the "other crimes" evidence did not deny him a fair trial in violation of his due process rights. Accordingly, we reverse the judgment of the district court.

I.

The district court first held that Amadeo's right to a fundamentally fair trial was violated by the admission of evidence of other crimes. This evidence established that Amadeo by his own admission made in the form of a statement to the police, had been involved in a robbery and homicide in Colbert County, Alabama on September 28, 1977, the night prior to the murder and attempted robbery in Putnam County, Georgia, which occurred at approximately 8:30 A.M. on September 29, 1977. *See* Record on Appeal, Exhibit I, Vol. II, pp. 200-02.

[1] On direct appeal, the Supreme Court of Georgia approved the admission of this evidence, finding that it met the Georgia standard for the admissibility of similar crimes evidence.[2] The supreme court also noted that the trial court instructed the jury that such evidence could be considered only to illustrate Amadeo's state of mind at the time of the Putnam County homicide and for no other reason. *Amadeo v. State*, 243 Ga. 627, 629, 255 S.E.2d 718, 720, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). Therefore, the supreme court held that the admission of the evidence, for that limited purpose, was a recognized exception in Georgia to the general rule against the admissibility of evidence of other criminal activities.[3]

The district court found that it was unnecessary for the State to introduce this evidence to establish identity, motive or intent to rob or to rebut Amadeo's defense of an accidental shooting, and consequently ruled that the evidence was inadmissible and nothing more than prosecutorial overkill. The court reached this conclusion because at the time the state trial judge considered Amadeo's motion to exclude this evidence, the State had a written confession signed by the appellee.[4] Also, an eyewitness identified Amadeo as the person who fired the fatal shot and there was conclusive ballistics testimony.[5]

[2, 3] In our view, this is not the proper inquiry in a federal habeas corpus proceeding. In considering state evidentiary objections, a federal court exercises limited review. The evidentiary error must have been "of such a magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.),[6] *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). *See also Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984) (per curiam), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). In determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness, a federal court must decide whether the evidence is "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d at 401. *See also Osborne v. Wainwright*, 720 F.2d 1237, 1238-39 (11th Cir.1983) (per curiam).

[4] We reject the district court's reasoning for several reasons. First, the Supreme Court of Georgia expressly ruled that the evidence was properly admitted under state law, a determination that is binding on this court as well as the district court. Since introduction of this evidence was relevant as a matter of Georgia law,

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1. Amadeo was convicted of murder and attempted armed robbery in the Superior Court of Putnam County, Georgia on November 30, 1977. The pertinent factual and procedural history of this case is contained in our first opinion, *Amadeo v. Kemp*, 773 F.2d 1141, 1142 (11th Cir. 1985) (per curiam) and in the opinion of the Supreme Court of Georgia, *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979).

2. As stated in *French v. State*, 237 Ga. 620, 621, 229 S.E.2d 410, 411 (1976), the first criterion for the admission of evidence of independent crimes is that the defendant must be shown to have been the perpetrator of the independent crime. The second requirement is that there be a sufficient connection between the independent crime and the offense charged so that the proof of the former tends to prove the latter. *See also Felker v. State*, 252 Ga. 351, 359, 314 S.E.2d 621, 631, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

3. The Georgia Supreme Court concluded that the evidence was probative of motive, i.e., that the Alabama and Georgia crimes were committed for the same reason, to obtain money while Amadeo was AWOL from the United States Marine Corps. *Amadeo v. State*, 243 Ga. at 629, 255 S.E.2d at 720.

4. The confession recited:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old white man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. Then I shot him. I shot one time. The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.
>
> Record on Appeal, Exhibit I, Vol. II, p. 225.

5. However, counsel for Amadeo maintained in opening and closing argument that the confession was involuntary and that the shooting was accidental. While no evidence was introduced by the defense on this issue, the potential for such defenses remained at the time of the admission of the "other crimes" evidence.

6. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

we cannot say that its admission denied Amadeo fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir.1983) (per curiam), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984).

Even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Amadeo's guilt of the Georgia murder defeats his argument that evidence of the Alabama crimes constituted a "crucial, critical, highly significant factor" in the case against him.

In any event, the overwhelming nature of the other evidence establishing Amadeo's guilt would render any constitutional error harmless beyond a reasonable doubt. *See Rose v. Clark*, — U.S. —, —, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1985): "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, but not a perfect one.'" *See also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

II.

The district court also predicated its grant of the writ on its finding that the 1977 master jury lists in Putnam County underrepresented women and blacks, depriving Amadeo of his equal protection rights. Amadeo did not attack the composition of the jury lists at the trial; he first raised the issue on direct appeal to the Supreme Court of Georgia. That court refused to address this assignment of error because of Amadeo's failure to complain of this possible infirmity at the time of trial. The district court excused this procedural default, finding that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials. Before reaching the merits of the jury composition issue, we must first examine Amadeo's failure to challenge these jury lists during his state court trial and the district court's conclusion that cause existed to forgo this challenge.

[5] A federal habeas corpus court will not consider an issue if the petitioner did not pursue that issue in the state court and thereby committed a procedural default, unless he can overcome this bar by showing cause for and actual prejudice from the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Georgia law clearly requires a criminal defendant to make a timely jury challenge at the trial. *See* O.C.G.A. §§ 15-12-162, 9-14-42(b). It is also undisputed that Amadeo failed to make such a timely challenge and that this failure constituted a procedural default under Georgia law. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720. Consequently, our inquiry turns to whether Amadeo can overcome this procedural bar by demonstrating sufficient "cause" and "actual prejudice."

Because federal courts must analyze "cause" under a wide variety of circumstances, no court has yet accorded that term a precise definition. Rather, guidance is provided by the policy rationale for the "cause" requirement. The avowed purpose of this requirement is to preserve the integrity of state judicial procedures and to bind a defendant to the tactical decisions of competent counsel, absent a miscarriage of justice. *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, 13 (1984); *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 518, 78 L.Ed.2d 699 (1983).

> In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court.
>
> ....
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

Reed v. Ross, 468 U.S. at 14, 104 S.Ct. at 2909, 82 L.Ed.2d at 13-14.

The Supreme Court furnished further instruction on this point in a recent decision:

> [W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel ... or that 'some interference by officials' ... made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, — U.S. —, —— —, 106 S.Ct. 2678, 91 L.Ed.2d 427 (1986).

We remanded this case to the district court to make the inquiry outlined in *Reed*. "To fulfill the causation prong ... it is necessary for petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d at 1145. That hearing established the sequence of events relating to Amadeo's failure to challenge the jury lists.

Amadeo's trial counsel, William A. Prior and E.R. Lambert, testified that they considered making a challenge to the grand and petit juries and were aware that minorities were probably underrepresented in the Putnam County master jury lists. Record on Appeal, 2d Supp., pp. 8, 11-13, 20. However, after reviewing the petit jury venire with a local attorney, they elected not to pursue the challenge for various tactical reasons.

First, they were satisfied with the representation of blacks on the venire, which was approximately fifty percent. *Id.* at 10. One attorney stated that he would be reluctant to try the case with any more blacks on the venire because the State possessed evidence that Amadeo, a white male, had assaulted a number of blacks in Alabama and Mississippi. The lawyer feared that a jury heavily weighted with black jurors might become prejudiced against Amadeo if the State introduced this evidence at the trial. *Id.* at 12. Second, the attorneys were satisfied with the existing venire because it contained several members of a charismatic religious group that had shown some sympathy for the welfare of local prisoners. *Id.* at 13. Such individuals were viewed as less likely to impose the death penalty. *Id.* at 30. Counsel also were aware that these advantages might be lost if the venire was challenged and the master list was reconstituted. *Id.* at 9.

Amadeo's lawyers confirmed their decision to waive a jury challenge when the actual jury selected for Amadeo's case contained an even number of blacks and whites and a majority of women. *Id.* at 12, 35-36. As such, they made no challenge to either the grand or the petit juries and did not make an effort to examine the master jury lists. As one lawyer testified, "it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with [a local attorney]; we felt like we had about as good a Jury List as we could get.... we made a tactical decision, a knowing, tactical decision not to challenge the array." *Id.* at 12-13.

After Amadeo was convicted and sentenced to death, and while his direct appeal was pending before the Supreme Court of Georgia, Christopher Coates, counsel in an unrelated civil suit, *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D.Ga. Aug. 15-

17, 1978),[7] discovered a 1977 memorandum from the county prosecutor advising the jury commissioners to add specified numbers of blacks to the lists. The memorandum was filed in the book containing the master jury lists and was available to anyone examining those lists. Record on Appeal, 2d Supp., pp. 41–42, 49–50. The district court characterized this memorandum as an effort to protect the jury lists from constitutional scrutiny by placing the names of enough blacks on the lists to preclude a prima facie case of jury discrimination, but still maintain as much racial disparity as possible.[8] Counsel advised Amadeo's counsel of this memorandum and they amended their appeal to include a challenge to the composition of the jury. As stated earlier, the Georgia Supreme Court declined to reach this issue because of the procedural default. *Amadeo v. State*, 248 Ga. at 629–30, 285 S.E.2d at 720.

The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey v. Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.[9]

[6] We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury lists and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

Our decision finds support in a 1984 decision of this court. In *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), a Georgia state prisoner maintained that his trial counsel's failure to question the racial composition of the jury was unreasonable and thereby constituted "cause" excusing the procedural default as well as ineffective assistance of counsel. In that case, as here, the lawyer considered a jury challenge and made a preliminary inquiry into the composition of the jury. *Id.* at 598. He decided to abandon the challenge, again for tactical reasons. In the opinion of the attorney, the racial mix of the jury venire and the actual jury empaneled to try the case was advantageous to the defendant and this advantage might be lost in a jury drawn from a revised list. *Id.* at 598–99. We found counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600–01. *See also Straight v. Wainwright*, 772 F.2d 674, 677–78 (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

7. *Bailey v. Vining* was a voting rights action challenging the at-large election system used in Putnam County.

8. Courts have indicated that a ten percent or smaller disparity between the proportion of a minority group in the relevant local population and its representation on jury lists is acceptable under the Constitution. Larger disparities may justify finding an equal protection violation. *See Swain v. Alabama*, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965); *Bowen v. Kemp*, 769 F.2d 672, 684–86 (11th Cir. 1985); *Preston v. Mandeville*, 428 F.2d 1392, 1393–95 (5th Cir.1970). *See generally Castaneda v. Partida*, 430 U.S. 482, 494–95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510–11 (1977) (elements of a prima facie case of jury discrimination). After the Putnam County jury commissioners complied with the prosecutor's suggestion, the grand jury list underrepresented blacks by 10.7% and the petit jury list underrepresented blacks by 5.1%. *See* Record on Appeal, Petitioner's Exhibit 4.

9. In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury. *See* Record on Appeal, 2d Supp., pp. 25–27, 46, 38–39, 62. These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.